

**BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI.**

The Opinion Below.

The opinion of the Circuit Court of Appeals rendered in this cause is found at Tr. 84.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Title 28, Section 347, and Section 688, Title 18, Criminal Code and Criminal Procedure and Rules 11 and 12 of Criminal Procedure of this Court (USCA).

The order of the Circuit Court of Appeals became final on July 23, 1945, on which date it denied the petition for rehearing (Tr. 91).

ARGUMENT.

**The acts of the agents were the essential elements
of the offense.**

When Agents of the Federal Bureau of Investigation were brought into the case they immediately took charge, elected to proceed and give orders. The acts of the personnel, from that time, became the acts of the Agents. These acts are setting up of a counterfeit induction center, interviewing and instructing inductees, filling out and indorsing selectees' examination (buck sheet) not in the presence of the selectees, thereafter, the delivery thereof to the selectees and instructing them to re-enter the line of examination, where under supervision and orders of the Agents, the examination sheet was collected and selectees sent home.

It is our further contention the facts in this case fall within the cases mentioned in the case of *Sorrels v. United States*, 287 U. S. 435, 442, mentioned under the following:

“There may also be physical conditions which are essential to the offense and which do not exist in the case of a trap, as for example, in the case of a prosecution for burglary where it appears that by reason of the trap there is no breaking. *Rex. v. Egginton*, 2 Leach, C.L. 913, 168 Eng. Reprint 555; *Reg. v. Johnson*, Car & M 218, 174 Eng. Reprint 479; *Saunders v. Peo.*, 38 Mich. 218; *People v. McCord*, 76 Mich. 200, 42 N.W. 1106, 8 Am. Crim. Rep. 117; *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 477; *Love v. Peo.*, 160 Ill. 501, 32 L.R.A. 139, 43 N.E. 710.”

It is not contended that the facts in the instant case fall within the *Sorrels* case, but they fall under the above sen-

tence of that case. This Court appears to have approved the principle set forth in the case.

Love v. Peo., supra, which has been cited in and by #1 Wharton Criminal Law, page 527, sec. 390, 1932 ed., which states:

"The decoys and detectives so long as they do not cease to be decoys and detectives and not become the originators of the criminal act *or do some overt act constituting the offense charged* are not guilty of the crime charged although apparently lending their aid and cooperation." (Italics Ours.)

In the 15 American Jurisprudence, section 335, page 25, it appears:

"However, a different situation is presented where the defendant, intending to commit a crime, proposes to a third person to assist in it, and he seeking to decoy the defendant and secure his conviction, assents to the scheme and assists in carrying it out after notifying the authorities. In such a case the defendant cannot be convicted unless he does or participates in all the acts necessary to constitute the crime. The principle here involved is that the defendant cannot be charged with any act done by the decoy, because the decoy has no criminal intent."

Among the authorities cited in support of the principal is *State v. Hayes*, 105 Mo. 76, 16 S.W. 514, 24 Am. St. Rep. 360, overruled on another point 142 Mo. 450, 44 S.W. 239, wherein the defendant proposed a burglary to one H who consented but notified the authorities. The defendant and H went to the building in question and the defendant opened a window and assisted H to enter. H handed out goods to the defendant who carried them away. It was held that the defendant could not be convicted of burglary because he had not done all the acts essential to constitute that crime.

In *State v. Jansen*, 22 Kan. 498, cited in *State v. Hayes*, supra, the Court, quoting Judge Brewer, said:

"The act of a detective may not be imputable to the defendant as there is a want of community of motive. The one had a criminal intent, while the other is seeking the discovery and punishment of crime."

The instant prosecution is predicated upon the evasion of services in the Armed Forces of the United States in violation of Section 311, Title 50, Appendix, USCA, which is as follows:

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of

the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 p.m., E.S.T., c. 720, sec. 11, 54 Stat. 894."

CONCLUSION.

It is respectfully suggested that the question urged is substantial. It is not idle or frivolous. It is a question as we view of conviction for a crime the defendants did not commit.

WHEREFORE, we further suggest that the record is such that in the exercise of the discretion reposed in this Court the writ of certiorari be granted, and the cause reviewed.

All of which is respectfully submitted.

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August 14, 1945,
Chicago, Illinois.

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AUG 17 1945

~~CHARLES E. BROWN~~ PROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 332

JAMES SAMUEL CERONE,
FRANK JOHN CERONE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION AND BRIEF.

GERALD T. WILEY,
VICTOR E. LARUE,
EUGENE A. TAPPY,
Attorneys for Petitioners.



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**PETITION FOR
A WRIT OF
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OCTOBER TERM, A. D. 1944.

JAMES SAMUEL CERONE,
FRANK JOHN CERONE,
Petitioners,
vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioners James Samuel Cerone and Frank John Cerone respectfully show to the Court as follows:

That they are residents of the County of Cook, and State of Illinois, and are citizens of the United States, born at Chicago, Illinois, James Cerone, on July 14, 1919 and Frank Cerone on April 12, 1912.

That they were sentenced by the District Court of the United States for the Northern District of Illinois, East-

ern Division, on the 7th day of March, 1945. James Cerone was sentenced to a term of five years. Frank Cerone was sentenced to five years and fined \$10,000.00 upon an indictment charging violation of Section 311, Title 50, Appendix USCA.

That on appeal from said judgment the Circuit Court of Appeals for the Seventh Circuit on the 30th day of June, 1945, affirmed said judgment; and on the 23rd day of July, 1945, denied a rehearing of said cause; and, on July 24th, 1945, entered an order staying the mandate pursuant to Rule 25 of that court.

SUMMARY STATEMENT OF MATTER INVOLVED.

On June 30, 1944, the grand jury returned an indictment in the District Court charging James Cerone with evading services in the armed forces of the United States and Frank Cerone with aiding and abetting him in the following manner: Frank Cerone by the offer and promise of \$500.00 as a present and emolument to certain United States naval personnel, assigned to service at the Induction Station at Chicago, Illinois, persuaded and induced them to make certain false, untrue and fraudulent entries upon the record of the examination commonly called the "buck sheet" of the defendant James Cerone, at the Induction Station, while James Cerone was being examined as to his physical and mental fitness for services in the armed forces of the United States, by means of which said false, untrue and fraudulent entries James Cerone was rejected for service in the land or naval forces of the United States; that James Cerone did, while being examined and having possession of his record of examination, called the "buck sheet," hand and present said record of

examination called the "buck sheet" to said United States Naval personnel in order that they might make said false, fraudulent and untrue entries thereon, both of said defendants well knowing that said entries were false, fraudulent and untrue and then and there intending by means of said false, fraudulent and untrue entries to procure the rejection of James Cerone for service in the land or naval forces of the United States.

The defendants pleaded not guilty, were tried by a jury and found guilty.

Motions for a directed verdict, motions for new trial and a arrest of judgment were denied with exceptions, and a bill of exceptions was presented.

STATEMENT OF FACTS.

Four indictments under the same statute were returned, as follows:

1. 44 CR 454, U. S. v. George N. Alex and Frank Cerone.
2. 44 CR 455, U. S. v. Charles Bartoli and Frank Cerone.
3. 44 CR 456, U. S. v. William and George Aloisio and Frank Cerone.
4. 44 CR 457, U. S. v. James and Frank Cerone.

The government elected to proceed first with the trial of 44 CR 457, which is the subject matter of the present petition, followed with 44 CR 456, with the remaining two indictments continued until the October Term 1945.

Petitioners did not take the witness stand. The evidence of the government may be briefly stated as follows: Chief Petty Officer Stephenson was assigned to the induction

center at Chicago with duties of reviewing buck sheets and assigning selectees to the various branches of the armed service. He met Frank Cerone in March, 1944, at a tavern and after several conferences Frank Cerone suggested Stephenson try to formulate a plan to have selectees rejected (Tr. 16); thereafter, by his own efforts, Stephenson secured the rejection of Bartoli and was paid \$1,000.00 by Frank Cerone (Tr. 17). On March 27th or 28th Stephenson contacted Chief Petty Officer Curran, assigned to the same induction center, whose duties were to induce qualified selectees to enter radar training. Stephenson told Curran of the first rejection and wanted Curran to assist him in securing further rejections. Curran never had any intention of entering into the securing of rejections, delayed for a time to think it over, and immediately reported the matter to his superior officers, including Stephenson's confession as to Bartoli (Tr. 35). Agents from the Federal Bureau of Investigation were called in. Curran was ordered by his superior officers to work under the direction of the Agents, and thereafter was in constant touch and under orders of the Agents. Curran and Stephenson then formulated a new plan for securing rejections of selectees, which consisted of having the selectee meeting Curran and Stephenson one day prior to their examination when selectees were taken to the induction center, where under surveillance of Agents, they were put through a rehearsal and instructed as to what to do on the day of their examination. It was the plan of Stephenson and Curran to reject selectees on a mental basis and they secured a "Rejected by the Armed Forces" stamp, a "Psycho-neurosis Mixed Type" stamp and a list of medical words, which if indorsed on the buck sheet, would show a mental unfitness (Tr. 17, 35).

On April 13th, 1944, the first rejection under this plan, that of George Alex, was procured by Curran writing on

his buck sheet the medical findings constituting him unfit for service. Curran also stamped thereon the stamp of "Psycho-neurosis Mixed Type" and the stamp of "Rejected by the Armed Forces." (Tr. 17, 35, Ex. 5, 6, 7). For which Stephenson received from Frank Cerone \$1,000.00, paying \$500.00 to Curran. (Tr. 24). On April 23rd Stephenson confessed and informed the Agents of every fact and detail of the Charles Bartoli and George Alex cases and also the plan with Curran. Stephenson agreed with the Agents to follow their orders and directions, with the understanding there would be no indictment against him for getting subsequent rejections (Tr. 25).

On May 12, 1944, the rejection of George Sam Aloisio was procured by Curran writing on his buck sheet the medical finding constituting him unfit for service. Curran also stamped thereon the stamp of "Psycho-neurosis Mixed Type" and the stamp of "Rejected by the Armed Forces." For which rejection Stephenson received from Frank Cerone \$500.00, delivering \$250.00 to the Agents and \$250.00 to Curran, who turned it over to the Agents. (Tr. 25, 26).

James Cerone appeared for examination on May 24th, 1944. As in the previous rejections on May 23rd, he was rehearsed, instructed and conducted through the induction center by Stephenson and Curran, under the surveillance of the Agents, who took moving pictures.

On May 24th, 1944, at the time of his examination, James Cerone regularly received his papers for examination, the "buck sheet," took all regular examinations to the station where he was told to step out of line and proceed to Curran's office. Curran had petitioner put his buck sheet in Curran's desk drawer and instructed petitioner to return in one-half hour. As in the previous rejections, and under

the surveillance of Agents, in his own handwriting Curran indorsed the medical finding constituting mental unfitness and further indorsed thereon the rubber stamp of "Psychoneurosis Mixed Type" and the rubber stamp "Rejected by the Armed Forces." Frank Cerone paid Stephenson \$500.00 for the rejection. Stephenson gave \$250.00 to the Agents and \$250.00 to Curran. Curran gave his \$250.00 to the Agents. (Tr. 28, 29, 36)

With the exception of the Bartoli case, the rejected selectees, under orders of the Agents, were formally notified of their rejections by their respective draft boards and all subsequently arrested.

Jurisdiction.

This Court has jurisdiction to review this cause under Section 240 of Judicial Code, Title 28, Section 347, and Section 688, Title 18, Criminal Code and Criminal Procedure, and Rules 11 and 12 of Criminal Procedure of this Court. (USCA Pocket Edition to Title 18)

Question Presented.

There is one question presented to this Court, whether the acts performed by the law enforcement officers can be imputed and charged to the petitioners.

Reasons Relied Upon for the Allowance of the Writ.

So far as petitioners are informed this case presents for the first time whether law enforcing agents may actually perform the essential elements of an offense and impute and charge them to the accused.

Petitioners in the Circuit Court of Appeals by leave of Court filed a consolidated brief and that Court properly

filed a consolidated opinion. However, the contentions of the petitioners, John Cerone and Frank Cerone, are not mentioned in the opinion and the petition for rehearing urging the same contentions was denied.

Specification of Errors.

The trial court erred in not directing a verdict of not guilty; in overruling a motion for a new trial; and overruling motion in arrest of judgment.

The Circuit Court of Appeals erred in affirming the judgment.

WHEREFORE it is respectfully requested this petition for a writ of certiorari be allowed and the writ be granted to review the judgment of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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